



DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2021-0109; Notice No. 2022-02]

Hazardous Materials: Frequently Asked Questions - Applicability of the Hazardous Material Regulations

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice; request for comments.

SUMMARY: PHMSA is announcing an initiative to convert historical letters of interpretation (LOI) applicable to the Hazardous Materials Regulations that have been issued to specific stakeholders into broadly applicable frequently asked questions on its website. By creating a repository of frequently asked questions, PHMSA seeks to eliminate the need for recurring requests for common letters of interpretations. This Federal Register Notice introduces this initiative and its objectives to those subject to the Hazardous Materials Regulations. PHMSA's objective is to gain insight regarding the utility of this initiative and topics to prioritize in the development of future frequently asked questions. PHMSA requests comment on the initiative and input on the prioritization of future sets of frequently asked questions.

DATES: Interested persons are invited to submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Comments received after that date will be considered to the extent practicable.

ADDRESSES: You may submit comments identified by the Docket Number PHMSA-2021-0109 by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 1-202-493-2251.

- *Mail:* Docket Management System; U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE, Washington, DC 20590.
- *Hand Delivery:* Docket Management System; Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and Docket Number (PHMSA-2021-0109) for this notice. To avoid duplication, please use only one of these four methods. All comments received will be posted without change to the Federal Docket Management System (FDMS) and will include any personal information you provide.

Docket: For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov> or DOT’s Docket Operations Office (see **ADDRESSES**).

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public. DOT posts these comments, without edit, including any personal information the commenter provides, to <http://www.regulations.gov>, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <http://www.dot.gov/privacy>.

Confidential Business Information (CBI): CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as “CBI.” Please mark each page of your submission containing CBI as “PROPIN.” Submissions containing CBI should be sent to Arthur Pollack, Standards and Rulemaking Division, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue,

SE, Washington, DC 20590-0001. Any commentary that PHMSA receives which is not specifically designated as CBI will be placed in the public docket for this notice.

FOR FURTHER INFORMATION CONTACT: Arthur Pollack, Standards and Rulemaking Division, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

PHMSA is announcing an initiative to publish frequently asked questions (FAQ) on its website to facilitate better public understanding and awareness of the hazardous materials regulations (HMR; 49 CFR Parts 171-180). The FAQ contained in this notice are intended to clarify, explain, and promote better understanding of the HMR. FAQ are not substantive rules, themselves, and do not create legally enforceable rights, assign duties, or impose new obligations not otherwise contained in the existing regulations and standards, but are provided to help the regulated community understand how to comply with the regulations. However, an individual who can demonstrate compliance with the FAQ is likely to be able to demonstrate compliance with the relevant regulations. If a different course of action is taken by an individual, the individual must be able to demonstrate that its conduct is in accordance with the regulations.

PHMSA is creating a repository of these questions, which will remove the need for recurring requests for common letters of interpretation and will assist PHMSA in streamlining the use of its resources by eliminating frequently asked and recurring (LOI). This initiative will provide additional value to PHMSA's Online Code of Federal Regulations (oCFR) tool found at <https://www.phmsa.dot.gov/standards-rulemaking/hazmat/phmsas-online-cfr-ocfr>. The oCFR tool is an interactive web-based application that allows users to navigate with a single click between all content, including LOI connected to an HMR citation. The oCFR tool includes the ability to sort, filter, and export search results. Upon completion of this initiative, the PHMSA

Office of Hazardous Materials Safety (OHMS) will be able to achieve efficiencies for other more complex or novel requests for LOI and devote resources to other hazardous materials transportation safety projects. Resources may be made available for other improvement-related operations such as petitions for rulemakings, public outreach and engagement, and economically beneficial regulatory and policy improvements. The information provided in this notice is useful to the regulated community, private citizens intending to offer a hazardous material for transportation, and state and local entities involved in hazardous materials transportation. PHMSA is publishing the first set of questions developed under this initiative.

II. Background

Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*) directs the Secretary of Transportation (“the Secretary”) to establish regulations for the safe and secure transportation of hazardous materials in commerce. The Secretary is authorized to apply those regulations to (1) persons who transport hazardous materials in commerce, (2) persons who cause hazardous materials to be transported in commerce, (3) persons who manufacture or maintain a packaging or a component of a packaging that is represented, marked, certified, or sold as qualified for use in the transportation of a hazardous material in commerce, (4) persons who indicate by marking or other means that a hazardous material being transported in commerce is present in a package or transport conveyance when it is not, and (5) persons who tamper with a package or transport conveyance used to transport hazardous materials in commerce or a required marking, label, placard, or shipping description.

In 49 CFR 1.97, the Secretary delegated authority to issue regulations for the safe and secure transportation of hazardous materials in commerce to the PHMSA Administrator. The PHMSA Administrator issues the HMR under that delegated authority. The HMR prescribes requirements for the safe transportation in commerce of hazardous materials, including provisions for classification, packaging, and hazard communication.

To facilitate its safety mission and promote better awareness of its programs and compliance requirements, OHMS periodically issues agency guidance in the *Federal Register* and on its publicly available website¹ for use by the regulated community, PHMSA staff, and federal, state, and local partners. This information is non-binding material given to the public pertaining to information and resources useful to comply with the HMR and is also used to make the public aware of safety issues or best practices. PHMSA issues this information through posted FAQ, advisory bulletins, publications, and policy manuals. PHMSA also answers questions from stakeholders through its staff and the Hazardous Materials Information Center (HMIC)² and by issuing LOI. As provided in 49 CFR 105.20 (Guidance and Interpretations), a member of the public may request information and answers to questions on HMR compliance by contacting the OHMS Standards and Rulemaking Division or the HMIC.³ OHMS receives an average of 250 requests for LOI each year. While each letter of interpretation is fact specific, some of these requests for interpretations present similar circumstances to earlier questions that have previously been asked, answered, and published on PHMSA's oCFR website at <https://www.phmsa.dot.gov/standards-rulemaking/hazmat/phmsas-online-cfr-ocfr>.

The purpose of this FAQ initiative is to optimize the effectiveness, reach, and impact of the OHMS LOI process. Through publishing FAQ, PHMSA will memorialize in broadly applicable guidance its historical letters of interpretation for, and applicable to, specific stakeholders regulated by the HMR. Specifically, this initiative will adapt currently available stakeholder engagement functions to more directly appeal to a broader regulated community, develop a systematic process in managing/curating agency information that can be incorporated

¹ <https://www.phmsa.dot.gov/guidance>

² The HMIC can be reached at 1-800-467-4922 and infocntr@dot.gov. For additional information visit: <https://www.phmsa.dot.gov/standards-rulemaking/hazmat/hazardous-materials-information-center>

³ To request a formal letter of interpretation, persons may also write to: Mr. Shane Kelley, Director, Standards and Rulemaking Division, U.S. DOT/PHMSA (PHH-10), 1200 New Jersey Avenue, SE East Building, 2nd Floor, Washington, DC 20590. To obtain information and answers pertaining to statute compliance and preemption, persons must, as prescribed by 49 CFR 105.20(b), contact the office of the Chief Counsel at: Office of the Chief Counsel, U.S. DOT/PHMSA (PHC-10), 1200 New Jersey Avenue, SE East Building, Washington, DC 20590, or at (202) 366-4400.

conveniently into existing workflows, and create helpful tools for current stakeholders. The success of this initiative will be measurable by monitoring PHMSA website engagement, the rate of incoming calls to the HMIC, and the volume of incoming LOI requests. A successful project should see an increase in website engagement with either static or reduced rates of calls to the HMIC and a reduced volume of incoming LOI requests. In addition, the interpretation workflow should reflect more efficient processing and productivity.

III. Frequently Asked Questions: Applicability of Hazardous Materials Regulations to Persons and Functions

Section 171.1 addresses the applicability of the HMR for the safe and secure transportation of hazardous materials in commerce. PHMSA proposes to publish the following series of FAQ in the *Federal Register* and on its website to facilitate better understanding of the HMR applicability requirements and avoid the need for responding to frequent and recurring questions already addressed in accordance with § 105.20.

- 1) **Question:** Is a Federal, state, or local government agency subject to the HMR?

Answer: Pursuant to § 171.1(d)(5), a Federal, state, or local government that transports hazardous materials for non-commercial governmental purposes using its own personnel is not engaged in transportation in commerce and, therefore, is not subject to the HMR. As specified in § 171.1, the HMR governs the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce. The term “in commerce” does not include a Federal, state, or local government that transports hazardous materials for its own use, using its own personnel, and motor vehicles, aircraft, or vessel under its control.

- 2) **Question:** Are state universities subject to the HMR when transporting hazardous materials?

Answer: A state agency—such as a state university—that transports hazardous materials for its own non-commercial use, using its own personnel and vehicles, is not engaged in transportation in commerce and, therefore, is not subject to the HMR. However, if the university is privately-operated or is a state university offering hazardous materials for transportation to commercial carriers, the HMR apply.

- 3) **Question:** Is a hazardous material transported on private roads subject to the HMR?

Answer: Section 171.1(d)(4) states that the transportation of hazardous materials entirely on private roads with restricted public access is not subject to the HMR.

- 4) **Question:** Is a hazardous material subject to the HMR that only crosses a public road?

Answer: The transportation of hazardous materials that, for example, takes place by motor vehicle and within a contiguous plant or factory boundary, is not subject to the HMR. However, intra-plant transport that utilizes or crosses a public road is subject to the HMR during that portion of the transportation unless access to the public road is restricted by gates, traffic signals, guard stations, or similar controls, in accordance with § 171.1(d)(4).

- 5) **Question:** Are hazardous materials installed or used in or on a motor vehicle (e.g., gasoline in the motor vehicle's fuel tank) subject to the HMR?

Answer: Hazardous materials that are installed or used in or on a motor vehicle such as the motor vehicle's fuel, suspension, or safety systems are not subject to the HMR. Fuel systems and safety equipment may be subject to the Federal Motor Carrier Safety Regulations (FMCSR) or National Highway Traffic Safety Administration (NHTSA) requirements.

- 6) **Question:** Is the filling of a package with a hazardous material subject to the HMR if it is not being offered for transportation in commerce? For example, pouring a flammable liquid into bottles that may be transported eventually.

Answer: The answer is no. However, if there is a chance of future transportation in commerce, the stakeholder should consider placing that hazardous material in packaging suitable for transportation of that material in commerce to minimize safety risks associated with its re-packaging.

- 7) **Question:** Are stationary (storage) tanks containing a hazardous material such as propane subject to the HMR?

Answer: The answer is no, unless the tank is transported in commerce containing a hazardous material or its residue or if it is represented and maintained as a Department of Transportation (DOT) packaging usable for hazmat transportation.

- 8) **Question:** Are hazardous materials being transported for personal use subject to the HMR? For example, are pesticides that are transported from a store by individuals to treat their garden subject to the HMR?

Answer: The answer is no. Under part 171, the phrase "in commerce" means in furtherance of a commercial enterprise and transportation in a private motor vehicle for personal use is not considered in furtherance of a commercial enterprise even when transported in a leased or rented vehicle.

- 9) **Question:** Are privately-owned SCUBA tanks that are used for diving and marked as DOT specification cylinders subject to the HMR?

Answer: A SCUBA tank that is represented as conforming to HMR requirements—i.e., marked with a DOT specification marking—must be maintained by the owner of said SCUBA tank in accordance with the applicable specification requirements whether or not it is in transportation in commerce.

10) **Question:** Are government-owned hazardous materials transported for government purposes by contractor personnel subject to the HMR?

Answer: The answer is yes. As provided in § 171.1(d)(5), the HMR do not apply to transportation of a hazardous material in a motor vehicle, aircraft, or vessel operated by a Federal, state, or local government employee solely for noncommercial Federal, state, or local government purposes. However, contractor personnel are not considered government employees and the provisions of the HMR apply.

11) **Question:** Are gasoline cans transported by a landscaping company by motor vehicle subject to the HMR?

Answer: Commercial businesses—such as landscaping, swimming pool services, or construction companies—transporting hazardous materials are considered “in commerce” and subject to the HMR. However, when used in support of a business, the HMR provides an exception in § 173.6 for the transport of “materials of trade.”

12) **Question:** Are household hazardous wastes that are transported by a private person to a county drop-off facility subject to the HMR?

Answer: The answer is no, provided the household hazardous wastes are the individual’s personal property and he or she is not engaged in a commercial activity, such as a landscaping company or carpentry service.

IV. Notice Objectives

FAQ in this notice—and future FAQ published on PHMSA’s website—will help to reduce the volume of duplicative requests for information covered by the FAQ and will facilitate faster processing of more complex and novel LOI requests in the future. Furthermore, in addition to publishing the first set of FAQ in the *Federal Register*, this notice seeks public input specific to the anticipated benefits provided by the FAQ initiative and suggestions for future FAQ topics.

Signed in Washington, DC on March 16, 2022, under authority delegated in 49 CFR

1.97.

William A. Quade,
Deputy Associate Administrator of Hazardous Materials Safety,
Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2022-05958 Filed: 3/21/2022 8:45 am; Publication Date: 3/22/2022]